

Defenses To Sexual Assault Crimes

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4.1 Chapter Overview

This chapter discusses defenses applicable to criminal sexual conduct offenses and other related offenses.* The defenses are arranged alphabetically by common title and include discussion on applicability, elements, burden of proof, and other relevant issues.

Note: Not all defenses to crimes are discussed in this chapter. For instance, those defenses that do not apply to sex-related offenses (or, in other words, to the offenses detailed in Chapters 2 and 3), are not discussed in this chapter. Also, defenses that are contained within the statutory provisions of the crimes themselves are generally discussed with the specific crimes in Chapters 2 and 3, unless they require extended treatment, in which case they are discussed in this chapter.

*See Chapter 2 for discussion of criminal sexual conduct offenses. See Chapter 3 for discussion of other related offenses.

4.2 Applicability of Defenses and Rules on Instructing Juries

The rules for instructing juries on potential defenses have been established by case law, statute, and court rule. A trial court has a duty to instruct the jury not only on a crime's elements, but on all material issues, defenses, and theories if there is evidence to support them. See *People v Canales*, 243 Mich App 571, 574 (2000); *People v Mills*, 450 Mich 61, 81 (1995) (a trial court need not instruct the jury on defendant's theory of defense unless defendant makes such a request which is supported by the evidence); *People v Lemons*, 454 Mich 234, 248 (1997) (a defendant must produce "some evidence" on all elements of the defense before the trial court is required to instruct the jury regarding an affirmative defense); and *People v Ho*, 231 Mich App 178, 189 (1998) (a trial court is required to give a requested jury instruction only if the instruction is supported by the evidence or the facts).

Under MCL 768.29, a court “shall instruct the jury as to the law applicable to the case . . . The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.”

Under MCR 6.414(F), a court “must instruct the jury as required and as appropriate.”

4.3 Abandonment and Renunciation

*For more information on criminal attempt and solicitation, see Sections 3.6 and 3.29, respectively.

Although similar in concept, abandonment and renunciation are two affirmative defenses that differ in their applicability to offenses and in their specific requirements. Voluntary abandonment constitutes an affirmative defense to criminal attempt under MCL 750.92. *People v Kimball*, 109 Mich App 273, 286 (1981), modified on other grounds 412 Mich 890 (1981); and *People v Cross*, 187 Mich App 204, 206 (1991). Renunciation constitutes an affirmative defense to solicitation. MCL 750.157b(4). The requirements for each defense are discussed below.*

A. Voluntary Abandonment (Attempt Crimes)

1. Authority and Applicability

*See Section 3.6 for more information on the general attempt statute.

Though not expressly delineated as a defense, voluntary abandonment is rooted in the general attempt statute under MCL 750.92. *People v Kimball*, 109 Mich App 273, 279-280 (1981), modified on other grounds 412 Mich 890 (1981). The attempt statute’s use of the terms “fails,” “prevented,” and “intercepted” in the context of not completing the attempted offense establish criminal liability for *involuntary* abandonment of criminal purpose. Thus, *voluntary* abandonment, and not involuntary abandonment, is a defense to criminal attempt. *Id.* at 287. Abandonment is not a defense to conspiracy. See *People v Heffron*, 175 Mich App 543, 547-548 (1988) (“The crime of conspiracy is complete upon formation of the agreement—a withdrawal is ineffectual.”)

Abandonment is voluntary when it is “the result of repentance or a genuine change of heart.” *People v Cross*, 187 Mich App 204, 206 (1991), quoting Dressler, *Understanding Criminal Law*, § 27.08, p 356. Abandonment is *not* voluntary when:

“. . . the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of detention or apprehension. Nor is the abandonment ‘voluntary’ when the defendant fails to consummate the attempted offense after deciding to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.” *Kimball, supra* at 286-287.

A victim’s entreaties or pleadings may constitute “unanticipated difficulties” or “unexpected resistance,” and thus may negate a voluntary abandonment

defense. In *People v McNeal*, 152 Mich App 404, 416-417 (1986), the Court of Appeals affirmed defendant's attempted CSC II conviction, holding that the 16-year-old victim's pleadings—asking the defendant several times to let her go, telling the defendant she had to take two tests at school that day, promising not to tell anyone—amounted to “unanticipated difficulties” or “unexpected resistance” that negated defendant's defense of voluntary abandonment.

In *Cross, supra*, the Court of Appeals upheld defendant's conviction of attempted prison escape, finding insufficient evidence of voluntary abandonment where he was apprehended as he began climbing the prison's inner fence. “[A]bandonment is not voluntary where it is made in the face of apprehension or due to a realization that the attempted crime cannot successfully proceed. Indeed, to conclude otherwise would be to hold that a criminal who is caught in the act of committing a crime can avoid criminal punishment merely by ceasing the criminal attempt and surrendering to the authorities.” *Id.* at 210.

In *People v Stapf*, 155 Mich App 491, 495-496 (1986), the Court of Appeals upheld defendant's conviction of attempted kidnapping by finding involuntary abandonment. In this case, defendant grabbed a 14-year-old girl and dragged her 75 feet into the woods, only to let her go after he saw a flash and after she kicked, screamed, and hit him, all of which caused him to hide under a dock. “Under the present circumstances, defendant's abandonment was not voluntary Defendant's actions in going to the lake and hiding under a dock reinforced the idea that he abandoned his attempt because he thought someone was coming and he feared getting caught [C]ircumstances which increase the probability of apprehension negate the voluntariness of abandonment.” *Id.* at 496.

Voluntary abandonment applies to attempt crimes, regardless of whether the attempted crime requires specific or general intent. *People v Vera*, 153 Mich App 411, 417 (1986).

Note: In addition to attempt crimes, voluntary abandonment may also be applicable to the crime of assault with intent to commit criminal sexual conduct, MCL 750.520g(1). In *People v Jones*, 443 Mich 88 (1993), the Michigan Supreme Court unanimously affirmed a conviction, obtained after a bench trial, of *attempted* felonious assault. In so doing, the Court dismissed the view that attempted assault is not a crime: “[This view] is rooted in semantics and stems from the definition of assault as attempted battery.” *Id.* at 92. The Court noted that the concept of assault has evolved from an attempted battery to a separate, substantive offense. *Id.* at 91-95. Thus, based upon the rationale and holding of *Jones*, it is possible that voluntary abandonment constitutes a defense to assault and assault with intent to commit criminal sexual conduct involving penetration.

1. Elements of Defense

The elements of voluntary abandonment are listed in CJI2d 9.4 and paraphrased below as follows:

- 1) Defendant must show that he or she gave up the idea of committing the crime. To decide whether defendant has met the burden of proving abandonment, you must consider all the evidence that was admitted during the trial. If the evidence supporting the defense of abandonment outweighs the evidence against it, then you must find the defendant not guilty.
- 2) Abandonment must be a choice of free will. If the defendant gave up the idea of committing the crime because of unexpected problems or because something happened that made it more likely that he or she would be discovered or caught, he or she did not abandon the crime of his or her free will.
- 3) The abandonment of the attempted crime must be complete. If the defendant simply decided to commit the crime some other time or to commit it on a different victim or with a different criminal goal, he or she did not completely abandon the crime.
- 4) An attempted crime may be abandoned at any time before it is actually completed [or before it becomes impossible to avoid completing it. If the defendant started something that couldn't be stopped, he or she cannot claim that he or she abandoned the crime. For example, a person who abandons an attempt to kill after firing a shot at an intended victim may not use abandonment as a defense to attempted murder].
- 5) If you decide that the defendant freely and completely gave up the idea of committing the crime, then he or she is not guilty of the crime, even if you believe beyond a reasonable doubt that the defendant committed the alleged attempt.

2. Burden of Proof

A defendant must produce some evidence on all elements of an affirmative defense before the trial court is required to instruct the jury regarding the affirmative defense. *People v Lemons*, 454 Mich 234, 248 (1997). A defendant has the burden of proof to establish by a preponderance of the evidence a voluntary and complete abandonment of criminal purpose. *Kimball, supra* at 286. Shifting the burden of proof to defendant is not unconstitutional, because voluntary abandonment is an affirmative defense and thus does not negate an element of the offense. *McNeal, supra* at 417-418 (1986). See also *Kimball, supra* at 286 n 7 (“It is not unconstitutional to place this burden on the defendant since voluntary abandonment does not negate any element of the offense.”)

3. Voluntary Abandonment Is a Jury Question

The question of whether voluntary abandonment has been established is a jury question, and thus any challenge to it goes to the weight not sufficiency of the evidence. *McNeal, supra* at 415. However, if an affirmative defense is somehow established by the victim or other prosecution witness, a trial court may direct a verdict. *Id.* at 416.

B. Renunciation (Solicitation Crimes)

The renunciation defense applies to the statutory crime of solicitation. It is specifically authorized in the offense itself. MCL 750.157b(4). Like attempt and conspiracy, solicitation is an inchoate offense that can be charged in conjunction with criminal sexual conduct offenses and other related offenses.*

*See Chapter 3 for more information on these inchoate offenses.

1. Statutory Authority

MCL 750.157b(4) provides:

“It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection.”

2. Elements of Defense

The elements of renunciation for the crime of solicitation are listed in CJI2d 10.7 and paraphrased below:

- 1) Defendant gave up his or her criminal purpose voluntarily. Voluntarily means a true change of heart not influenced by outside circumstances. If the defendant gave up criminal purpose because of unexpected problems or resistance or because something happened that made it more likely that he or she would be discovered or caught, he or she did not renounce criminal purpose voluntarily.
- 2) Defendant gave up his or her criminal purpose completely. Completely means permanently and unconditionally. If the defendant simply decided to commit the crime some other time or to commit it on a different victim or with a different criminal goal, he or she did not renounce criminal purpose completely.
- 3) Defendant let the person solicited know that he or she was renouncing criminal purpose.

- 4) Defendant either warned the police in time and cooperated with them or made a real effort in some other way to prevent [the charged offense] from happening.
- 5) That [the charged offense] did not in fact happen.
- 6) If defendant fails to prove any of these things, then he or she has not proved the defense that defendant renounced criminal purpose.
- 7) In deciding whether the defendant has proved this defense, you should think about all of the evidence that was admitted during the trial. If you are satisfied that the evidence supporting renunciation outweighs the evidence against it, then the defendant has met his or her burden of proof and you must find him or her not guilty.
- 8) Renunciation is the only issue in this case that defendant has the burden of proving. If you decide that defendant has failed to prove this defense, you must still consider whether the prosecutor has met his or her burden of proving each of the elements of solicitation beyond a reasonable doubt.

Unlike voluntary abandonment, the affirmative defense of renunciation, established in MCL 750.157b(4), requires the solicitor to:

“(1) notify the solicitee of the solicitor’s intent to renounce the crime *and* either (2)(a) warn and cooperate with law enforcement officials or (2)(b) engage in other substantial efforts to prevent the event solicited from occurring. [Emphasis in original.] *People v Crawford*, 232 Mich App 608, 618 (1998).

In *Crawford*, the Court of Appeals held that a defendant’s mere nonpayment of funds for soliciting a murder did not, without more, constitute notice of an alleged intent to renounce solicitation. The defendant in *Crawford* refrained from making an agreed downpayment for the murder of a witness who was going to testify at defendant’s then-pending embezzlement trial. However, it was agreed that if defendant failed to make the payment, the witness would not be killed. The witness eventually testified, and defendant was convicted of solicitation to murder. On appeal, the Court of Appeals disagreed with defendant’s contention that he fulfilled the notice requirements by failing to make the downpayment, holding that “defendant’s mere nonpayment may be attributed to other reasons: that defendant, though still intending that the witness die, was simply unable to obtain funds for the downpayment; or . . . that defendant’s nonpayment . . . represented an attempt to obtain something for nothing.” *Id.* at 618. Furthermore, the Court held that a renunciation defense requires both notice and further efforts by the solicitor to prevent the solicited event from occurring. Thus, even had the Court accepted defendant’s notice argument, he simply “failed to demonstrate any attempt to either warn and cooperate with law enforcement or engage in other substantial efforts to stop the [person solicited] from killing the witness.” *Id.* at 619.

4.4 Accident

The accident defense, while commonly used in assault and homicide cases, is sometimes requested in criminal sexual conduct cases. Such an instruction may be requested if, for instance, the defendant alleges an unintentional or accidental sexual contact or penetration that occurred under what is normally thought to be lawful circumstances, such as performing a medical procedure, bathing someone, or changing a child's diaper, to name a few such circumstances.

The authority for interposing an accident defense in criminal sexual conduct cases is conflicting. Some appellate cases, as well as a criminal jury instruction, clearly state that the defense only applies to specific intent crimes. See *People v Hess*, 214 Mich App 33, 38-39 (1995) and CJI2d 7.3a. Under this authority, the accident defense is inapplicable to CSC I, II, III, and IV* crimes because of their general intent requirement. However, in *People v Legg*, 197 Mich App 131 (1992), the defendant interposed an accident defense to CSC I (victim 13-15 and member of same household). Defendant claimed, in a statement given to police, which was later read into the trial record, that he was “wrestling” with his 13-year-old stepdaughter when he accidentally touched her pubic hair with his fingers; he later added that his fingers “might have” gone in between her “vagina lips.” By contrast, the victim testified that defendant awakened her while partially removing her underpants and then digitally penetrated her vagina. Defendant was convicted after a bench trial of two counts of CSC I (one count was for digital penetration; the other count was for cunnilingus, which did not involve the accident defense). On appeal, defendant argued that the trial court failed to consider his accident defense. The Court of Appeals disagreed, finding that the trial court was aware of defendant's accident defense but that it disbelieved and disregarded it. Because the trial court in its findings and conclusions emphasized the defendant's words “might have” when referring to the alleged digital penetration of the victim's vagina, the Court of Appeals held that the trial court was aware of defendant's claim of involuntary touching. It also noted that the trial court found the victim's testimony credible, and that an accident defense was inconsistent with such testimony. Although the Court did not specifically decide whether an accident defense can be interposed on general intent CSC crimes, it found the accident defense inconsistent with the victim's testimony.

Note: A sexual contact may be intentional but lacking the required sexual purpose. In such circumstances, while the accident defense cannot be interposed because it involves an intentional contact, a defense may nonetheless be available as long as the sexual contact could not be reasonably construed as being for the purpose of sexual arousal or gratification. See Section 2.5(U) for more information on the CSC Act's sexual purpose element.

*Assault with intent to commit CSC is a specific intent crime. See Section 2.4 for more information on this crime.

A. Definition of “Accident”

“Accident” has been judicially defined in criminal cases by *People v Hess*, 214 Mich App 33 (1995). “Accident” means:

“[A] fortuitous circumstance, event or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap; some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops; something happening by chance; something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence.” *Id.* at 37, quoting *Allstate Ins Co v Freeman*, 432 Mich 656, 669 n 8 (1989), quoting *American States Ins Co v Maryland Casualty Co*, 587 F Supp 1549, 1552 (ED Mich, 1984).

B. Elements of Defense

The elements of an accident defense for specific intent crimes are listed in CJI2d 7.3a, which is paraphrased as follows:*

- 1) If the defendant did not intend to [state specific intent required], [he/she] is not guilty; and
- 2) The prosecutor must prove beyond a reasonable doubt that the defendant intended to [state specific intent required.]

*An accident defense also applies to murder, CJI2d 7.1-7.2, and manslaughter, CJI2d 7.3.

4.5 Alibi

Alibi testimony is “testimony offered for the purpose of placing [the] defendant elsewhere than at the scene of the crime.” *People v Mott*, 140 Mich App 289, 292 (1985). The alibi defense itself has been coined a “hip pocket” defense, because it can be easily manufactured in the final hours of trial. *People v Travis*, 443 Mich 668, 676 n 8 (1993). In Michigan, MCL 768.20 requires a defendant to give notice of the intent to use an alibi defense and to provide the names of all potential alibi witnesses; in turn, it requires the prosecutor to provide the names of all potential rebuttal witnesses. This statute, known as the notice-of-alibi statute, has a common purpose with other alibi statutes: to prevent the surprise introduction of an alibi defense, to deter perjury, and to save preparation and trial time. *Travis, supra* at 675-676.

A. Statutory Notice Requirements

MCL 768.20(1) provides the notice requirements for the alibi defense and the naming of alibi witnesses:

“If a defendant in a felony case proposes to offer in his defense testimony to establish an alibi at the time of the alleged offense, the defendant shall at the time of arraignment on the information or within 15 days after that arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney a notice in writing of his intention to claim that defense. The notice shall contain, as particularly as is known to the defendant or the defendant’s attorney, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant’s notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.”

MCL 768.20(2) provides the notice requirements for the naming of rebuttal witnesses:

“Within 10 days after the receipt of the defendant’s notice but not later than 5 days before the trial of the case, or at such other time as the court may direct, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal which shall contain, as particularly as is known to the prosecuting attorney, the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal to controvert the defendant’s defense at the trial of the case.”

MCL 768.20(3) places the defendant and prosecutor under a continuing duty to “disclose promptly” the names of additional witnesses who come to either party’s attention after the foregoing notice provisions have been filed. An additional witness may only be called to establish or rebut an alibi defense upon a showing, in a motion with notice to the other party, that the witness was not available and could not have been available by the exercise of “due diligence.” *Id.* “Due diligence is defined as doing everything reasonable, not everything possible.” *People v LeFlore (After Remand)*, 122 Mich App 314, 319 (1983).*

*See Section 4.5(G) for a discussion of the test used to allow or disallow alibi or rebuttal witnesses.

MCL 768.20(1)-(2) require notice of the names of prospective witnesses; they do not require that addresses or information regarding the nature of the testimony be given. *People v Travis*, 443 Mich 668, 679 (1993). However, MCR 6.201(1) mandates disclosure, upon request of a party, of the addresses of all lay and expert witnesses intended to be called at trial.

A prosecutor must list the name of a rebuttal witness even though that witness is listed in the defendant’s notice of alibi. *People v Wilson*, 90 Mich App 317, 320-321 (1979), relying on *People v Alexander*, 82 Mich App 621, 627 (1978). But see *People v Coulter*, 94 Mich App 531, 535 (1980), where the Court of Appeals held that the trial court’s ruling during trial allowing the testimony of rebuttal witnesses constituted notice “at such other time as the court may direct.” The Court of Appeals found that the defendant could not

have been surprised by the prosecutor's calling of the witnesses because the prosecutor told defense counsel several days before trial of his intention to call the witnesses who were listed in defendant's alibi notices.

A prosecutor "minimally complies" with the rebuttal notice statute by listing "any or all endorsed witnesses" as possible rebuttal witnesses. *People v Finley*, 161 Mich App 1, 10-11 (1987).

B. Elements of Defense

The elements of the alibi defense are listed in CJI2d 7.4* and paraphrased below:

- 1) The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed. The defendant does not have to prove that he/she was somewhere else.
- 2) If you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find the defendant not guilty.

According to *People v Erb*, 48 Mich App 622, 630 (1973), a jury must be instructed that the alibi defense provides two avenues of relief:

"First, if the alibi is established, a perfect defense has been shown and the defendant should accordingly be acquitted. Alternatively and, perhaps, more importantly, the instruction must clearly indicate that if any reasonable doubt exists as to the presence of the defendant at the scene of the crime [if such presence is necessary to commit the crime]* then, also, the defendant should be acquitted."

C. Burden of Proof

While the prosecutor has to prove beyond a reasonable doubt that the defendant was at the crime scene at the time of the crime, the defendant has the "burden of producing at least some evidence in support of his claim of alibi, possibly sufficient evidence to raise a reasonable doubt." *People v Fiorini*, 85 Mich App 226, 229-230 (1978). See also *People v McCoy*, 392 Mich 231, 235 (1974) (a defendant need not prove an alibi by preponderance of the evidence, but must only raise a reasonable doubt concerning the defendant's presence at the crime scene). Although a general denial of charges does not constitute an alibi defense, a defendant's uncorroborated testimony regarding his or her presence being elsewhere than at the crime scene entitles the defendant to a jury instruction. *People v McGinnis*, 402 Mich 343, 346-347 (1978).

Failing to give an unrequested alibi instruction is not reversible error, as long as the court gives a proper instruction on the elements of the offense and the

*CJI2d 7.4's Use Note recommends also giving the instruction on identification in CJI2d 7.8.

*See *People v Burden*, 395 Mich 462, 467 (1975), which added the bracketed language.

requirement that the prosecution prove each element beyond a reasonable doubt. *People v Burden*, 395 Mich 462, 467 (1975).

D. Alibi Instructions in Assault Cases

An alibi defense is not applicable to assault crimes where the alibi witnesses claim the defendant was with the victim, but not at the crime scene. In *People v Mott*, 140 Mich App 289 (1985), the Court of Appeals upheld the trial court's refusal to give an alibi instruction where defense witnesses testified that defendant was not at the crime scene, although he was with the apparently uninjured three-year-old victim during the time-frame of the murder. The Court held as follows:

"Thus, we hold that in cases involving an assaultive crime where the defendant and the victim must be together at the time of the crime, and where there is evidence that defendant did assault the victim, it is not an alibi to claim that defendant was with the victim elsewhere at a time when witnesses say that the crime was committed." *Id.* at 293.

E. Alibi Instructions in Aiding and Abetting Cases

A person may be criminally responsible for aiding and abetting a crime regardless of his or her presence at the crime scene. If the evidence shows that defendant aided and abetted through acts committed at the crime scene, an alibi instruction may be appropriate; if the evidence shows that defendant aided and abetted elsewhere, an alibi instruction should not be given. *People v Matthews*, 163 Mich App 244, 247-248 (1987) (it was error, although harmless, for the trial court to refuse to give an alibi instruction where evidence showed defendant was the driver of a getaway car in the armed robbery of a store).

F. Requests for Continuances to Perfect Alibi Notice

A request for continuance* to perfect an alibi notice should be evaluated under the four-factor test set forth as follows:

- (1) Is the defendant requesting the adjournment so that he or she may assert a constitutional right (e.g., the right to be represented by competent counsel)?
- (2) Does the defendant have legitimate grounds for asserting this right (e.g., an irreconcilable *bona fide* dispute with counsel over whether to call alibi witnesses)?
- (3) Is the defendant guilty of negligence for not having asserted this right earlier?
- (4) Has the defendant caused the trial to be adjourned at other times? See *People v Williams*, 386 Mich 565, 578 (1972); *People v Wilson*, 397 Mich 76, 81-83 (1976); and *People v Holleman*, 138 Mich App 108, 112-114 (1984).

*For more information on requests for continuances, see Monograph 6: *Pretrial Motions—Revised Edition* (MJJ, 2001), Section 6.10.

The moving party has the burden of establishing good cause for the adjournment. MCL 768.2 and MCR 2.503(B).

MCL 768.2 states the following regarding stipulations for adjournments, continuances, or delays:

“[N]o court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his [or her] discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done.”

A trial court has no duty to order a continuance in the absence of a request by a party. *People v Elston*, 462 Mich 751, 764-765 (2000). When requested by a party, continuances and adjournments are within the discretion of the trial court. *Williams, supra* at 575. However, the trial court is not required to exercise that discretion unless there is a showing of good cause and diligence by the moving party. *People v Taylor*, 159 Mich App 468, 489 (1987). See also MCR 2.503(C)(2) (the trial court may grant an adjournment based on the unavailability of a witness or evidence if it finds that diligent efforts were made to produce the witness or evidence).

Where the defendant is not at fault for the unavailability of an alibi witness, the trial court’s refusal to grant a short continuance to obtain the witness’s testimony is an abuse of discretion. *People v Pullins*, 145 Mich App 414, 417-418 (1985). However, where the delay is caused in part by the defendant’s negligence, the trial court does not abuse its discretion by denying a request for continuance. *People v Sekoian*, 169 Mich App 609, 614 (1988).

Where the trial court permits the late endorsement of a witness, the trial court should ordinarily grant a continuance to preserve the defendant’s right to a fair trial. See *Wilson, supra* at 81-83; and *People v Powell*, 119 Mich App 47, 50-52 (1982). Where four days before trial codefendants pled guilty, made new statements describing the defendant’s participation in the charged offenses, and agreed to testify against the defendant, the trial court abused its discretion in denying defendant’s motion for a continuance. *People v Suchy*, 143 Mich App 136, 139-148 (1985).

G. Sanction of Exclusion For Failure to File Required Notice

MCL 768.21(1)-(2) provide that the court “shall exclude” the testimony of a witness that is offered by the defendant or prosecutor to establish or rebut the alibi defense when proper written notice is not filed and served. However, despite the explicit language, the sanction of exclusion for testimony from alibi and rebuttal witnesses is discretionary on the trial court. Although the Court of Appeals in *People v Bennett*, 116 Mich App 700, 704 (1982), held that the only time limitation on filing a notice of alibi is ten days before the start of trial (and not within 15 days after arraignment), the Michigan Supreme Court in *People v Travis*, 443 Mich 668, 679 (1993) held that the language “or

at such other time as the court directs [or may direct]” gives the trial court “discretion to fix the timeliness of notice in view of the circumstances.” In exercising discretion on whether to exclude alibi or rebuttal testimony for a failure to comply with the notice requirements of MCL 768.20, a trial court must consider the following five factors:

- (1) The amount of prejudice resulting from the failure to disclose;
- (2) The reason for nondisclosure;
- (3) The extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- (4) The weight of the properly admitted evidence supporting the defendant's guilt; and
- (5) Other relevant factors. *Travis, supra* at 682, adopting the factors enunciated in *United States v Myers*, 50 F2d 1036, 1043 (CA 5, 1977).

Note: The Michigan Supreme Court in *Travis* expressly declined to adopt “due diligence” alone as the controlling standard in judging the timeliness of alibi or rebuttal notices, despite the phrase’s presence in MCL 768.20(3). *Travis, supra* at 681.

H. Impeachment of Alibi Witnesses

Before cross-examining an alibi witness, a prosecutor is not required to first establish a foundation regarding the alibi witness’s failure to come forward to inform the police of exculpatory information, as previously required under *People v Fuqua*, 146 Mich App 250, 255-256 (1985) (requiring some showing, on the record, as to why it would have been natural for the alibi witness to relate his or her story to police). *People v Gray*, 466 Mich 44 (2002). In *Gray*, the Michigan Supreme Court expressly overruled *Fuqua* and instead adopted the reasoning of *People v Phillips*, 217 Mich App 489 (1996), which held that no special foundation is necessary before the trier of fact may be apprised that an alibi witness failed to come forward earlier with exculpatory information. *Gray, supra* at 46-47

4.6 Confabulation

The defense of confabulation may be asserted in cases where witnesses have been hypnotized either *during* or *after* an alleged crime and who are later called to testify about such events.

Because of its inherent unreliability, post-hypnotic testimony is inadmissible as evidence in Michigan courts, unless it is “based on facts recalled and related prior to hypnosis.” *People v Lee*, 212 Mich App 228, 238 (1995). The exclusion of such testimony from evidence is based upon the “confabulation effect”: the inability of a person who has been hynotized to distinguish

between what was remembered before hypnosis from what was remembered after hypnosis. *People v Gonzales*, 424 Mich 908, 909 n 4 (1986). Thus, the confabulation defense is a defense that goes to a witness's credibility and weight of the testimony; it is not an *affirmative* defense. *People v Sorscher*, 151 Mich App 122, 132 (1986).

Because the confabulation defense is asserted only rarely in criminal cases in Michigan, further discussion of this defense is outside the scope of this Benchbook. For more information on hypnosis, confabulation, and the dangers of using hypnosis to refresh recollection or restore memory, see *People v Gonzales*, 415 Mich 615, 626-627 (1982), modified 417 Mich 968 (1983); and *Scientific Evidence* (MJI, 1994), Chapter 16. For definitions of "confabulation," see *Gonzales, supra* at 624 (confabulation is the "process of filling the gaps of memory with fantasy"); and *Webster's New World Dictionary (2d Ed)* ("[T]o fill in gaps in the memory with detailed, but more or less unconscious, accounts of fictitious events").

4.7 Consent

This section addresses the consent defense as a defense to criminal sexual conduct offenses.

A. Applicability to Criminal Sexual Conduct Offenses

The Criminal Sexual Conduct Act is silent on the defense of consent. However, the defense has been established by case law. In *People v Hearn*, 100 Mich App 749, 755 (1980), the Court of Appeals stated:

"Although the [CSC] statute does not specifically address the defense of consent, its various provisions when considered together clearly imply the continuing validity of that defense. Certainly the Legislature, in eliminating the necessity of proof of nonconsent by the prosecution, did not intend to preclude an accused from alleging consent as a defense to the charge." *Id.*

Note: Michigan's repealed rape statute, MCL 750.520, required proof that sexual intercourse was "against her will," making nonconsent of the female an element of the crime. However, under the CSC Act, a prosecutor is not required to prove nonconsent as an independent element of the offense. *People v Jansson*, 116 Mich App 674, 682 (1982). Instead, a prosecutor must disprove the defense of consent beyond a reasonable doubt. *People v Thompson*, 117 Mich App 522, 528 (1982). For a review of the salient Legislative history regarding the elimination of nonconsent as an element in CSC crimes, see *People v Khan*, 80 Mich App 605, 619 n 5 (1978); and *People v Stull*, 127 Mich App 14, 20-21 (1983).

The defense of consent is an affirmative defense. See *People v Thompson*, 117 Mich App 522, 528 (1982); and the Use Note to CJI2d 20.27. Except for the offenses detailed in the next subsection, which involve victims who lack legal capacity to consent, the defense of consent may be applied to all other CSC offenses, including those offenses with elements that contain the language “armed with a weapon,” *People v Hearn*, *supra* at 753-755, and “commission of any other felony,” *Thompson*, *supra* at 525-526.*

*For more information on these offenses, see Sections 2.5(D) and 2.5(G), respectively.

Consent is also a defense to any assault crime, including assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1), even if the victim is under 16. *People v Worrell*, 417 Mich 617, 621-623 (1983).* Although consent by minors under 16 years of age is legally ineffective as a defense to any degree of CSC offense, including an attempt to commit such an offense, it is *legally effective* for the offense of assault with intent to commit CSC. *Id.*

*The rationale of *Worrell* presumably also applies to assault with intent to commit CSC II, MCL 750.520g(2).

In *Worrell*, the defendant was convicted of assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1), but acquitted of CSC III (victim 13-15) and attempted CSC III (victim 13-15), for engaging in consensual sexual intercourse with a 13-year-old girl. On appeal, the Michigan Supreme Court reversed defendant’s assault with intent to commit CSC conviction, stating:

“If the other person is a willing partner to the physical act, there can be no assault because there is no reasonable apprehension of immediate injury. . . . Assault and consent are mutually exclusive. There can be no assault without proof of force or threat thereof. Accordingly, while consent will not amount to a defense to the charge of criminal sexual conduct or attempt to commit it, it is a defense to every charge of assault.” *Id.* at 622.

The Supreme Court in *Worrell* found that minors can consent to assault. “While it is true that the consent of the minor is irrelevant to a charge of statutory rape or attempt to commit statutory rape, it is relevant to a charge of assault with intent to commit statutory rape.” *Id.* at 621. In reversing defendant’s conviction, the Court stated, “Because the sexual activity here is not claimed to be other than consensual, there is no evidence to support a verdict of assault” *Id.* at 623. Finally, although *Worrell* was decided under MCL 750.520g(1), assault with intent to commit CSC involving sexual penetration, the rationale of the opinion presumably extends to MCL 750.520g(2), assault with intent to commit CSC II.

B. Consent Inapplicable to Certain CSC Offenses

The consent defense does not apply to CSC offenses involving victims who lack legal capacity to consent. In *People v Khan*, 80 Mich App 605 (1978), the Court of Appeals limited the application of consent to certain CSC crimes:

“[A] willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither ‘mentally defective’ . . . ‘mentally incapacitated’ . . . nor ‘physically helpless’

. . . is not criminal sexual conduct.” *Id.* at 619 n 5. [Citations omitted.]

Note: Although the “mentally defective” element quoted above has been deleted from the CSC Act, the Legislature has added other “mental” elements, such as “mentally disabled,” “mentally incapable,” “mentally retarded,” and “mental illness.” See Sections 2.5(M)-(O) and (Q). The quoted language of *Khan* presumably applies to these additional “mental” elements.

Based on the holding in *Khan*, consent should not be recognized as a defense to CSC offenses involving complainants who suffer from a “mental illness,” or who are “mentally disabled,” “mentally incapable,” “mentally retarded,” “mentally incapacitated,” “physically helpless,” or under the age of 16. The consent of such complainants is legally ineffective because they are presumed to be incapable of truly consenting to the sexual act. See *People v Davis*, 102 Mich App 403, 408 (1980); and *People v Worrell*, 417 Mich 617, 623, 628 (1983).

1. Offenses Requiring Proof of Age

The CSC Act contains elements that require proof of a victim’s age as being under 13 or at least 13 but less than 16. Because a person under 16 years of age is incapable of legally consenting to a sexual act, except in cases of an assault or an assault with intent to commit CSC, see *Worrell*, *supra* at 621-623, consent is inapplicable for all CSC elements requiring proof of a victim’s age. *People v Cash*, 419 Mich 230, 247-248 (1984).^{*} Furthermore, the reasonable mistake-of-fact defense is inapplicable to these offenses because they do not contain the “knows or has reason to know” language that is necessary for such a defense. See Section 4.11, for more information on this defense.

Consent may *not* be interposed as a defense to the following CSC offenses:

F First- and second-degree criminal sexual conduct

- Victim under 13. MCL 750.520b(1)(a) (CSC I); and MCL 750.520c(1)(a) (CSC II).
- Victim at least 13 but less than 16 and actor is a member of the same household as the victim. MCL 750.520b(1)(b)(i) (CSC I); and MCL 750.520c(1)(b)(i) (CSC II).
- Victim at least 13 but less than 16 and actor is related to the victim by blood or affinity to the fourth degree. MCL 750.520b(1)(b)(ii) (CSC I); and MCL 750.520c(1)(b)(ii) (CSC II).
- Victim at least 13 but less than 16 and actor is in a position of authority over the victim and used this authority to coerce the victim to submit. MCL 750.520b(1)(b)(iii) (CSC I); and MCL 750.520c(1)(b)(iii) (CSC II).

F Third-degree criminal sexual conduct

- Victim at least 13 but less than 16. MCL 750.520d(1)(a) (CSC III).

^{*}Although *Cash* was decided under the CSC III (victim 13-15) statute, the Supreme Court stated that the same policy reasons apply with even greater force to the under 13 age group. *Cash*, *supra* at 234 n 1.

F Fourth-degree criminal sexual conduct

- Victim at least 13 but less than 16 and the actor is five or more years older than the victim. MCL 750.520e(1)(a) (CSC IV).

Note: The CSC Act protects a spouse from being charged and convicted under the Act “solely because [the other spouse] is under 16, mentally incapable, or mentally incapacitated.” MCL 750.520l.

2. Offenses Requiring Proof That a Victim Is “Mentally ill,” “Mentally Retarded,” “Mentally Disabled,” “Mentally Incapable,” “Mentally Incapacitated,” or “Physically Helpless”

The CSC Act contains elements that require proof of a victim’s incapacity. A victim who has a “mental illness” or who is “mentally retarded,” “mentally disabled,” “mentally incapable,” “mentally incapacitated,” or “physically helpless”^{*} is conclusively presumed to be legally incapable of giving consent under the CSC Act; accordingly, consent is inapplicable to these offenses. In *People v Davis*, 102 Mich App 403, (1980), a CSC III case involving the former “mentally defective” element, the Court of Appeals stated as follows:

“The rationale behind statutes prohibiting sexual relations with mentally defective persons is that such persons are presumed to be incapable of truly consenting to the sexual act. This rationale remains just as cogent in light of the enactment of [CSC III sexual penetration with a mentally defective, mentally incapacitated, or physically helpless person].” *Id.* at 408.

However, a reasonable mistake-of-fact defense^{*} may be applicable if the element contains the “knows or has reason to know” language. As the Court of Appeals in *Davis, supra*, stated: “We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons.” *Id.* at 407.

Consent may *not* be interposed as a defense to the following CSC offenses:

F First- and second-degree criminal sexual conduct

- Aided and abetted by 1 or more persons and actor knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(d)(i) (CSC I); and MCL 750.520c(1)(d)(i) (CSC II).
- Personal injury to victim and actor knows or has reason to know that victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(g) (CSC I); and MCL 750.520c(1)(g) (CSC II).
- Victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless and actor is related to victim by blood or affinity to fourth degree. MCL 750.520b(1)(h)(i) (CSC I); and MCL 750.520c(1)(h)(i) (CSC II).

^{*}See Sections 2.5(M)-(S) for the definitions of these terms.

^{*}See Section 4.11 for more information on the reasonable mistake-of-fact defense.

- Victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless and actor in position of authority over victim and used this authority to coerce the victim to submit. MCL 750.520b(1)(h)(ii) (CSC I); and MCL 750.520c(1)(h)(ii) (CSC II).

F Third- and fourth-degree criminal sexual conduct

- Actor knows or has reason to know that victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520d(1)(c) (CSC III); and MCL 750.520e(1)(c) (CSC IV).

Note: The CSC Act protects a spouse from being charged and convicted under the Act “solely because [the other spouse] is under 16, mentally incapable, or mentally incapacitated.” MCL 750.520l.

C. Elements of Defense

The elements of the consent defense are listed in CJI2d 20.27 and is paraphrased below:

- 1) A person consents to a sexual act by agreeing to it freely and willingly, without being forced or coerced.
- 2) It is not necessary to show that the victim resisted the defendant to prove that this crime was committed. Nor is it necessary to show that the victim did anything to lessen the danger to himself or herself.
- 3) In deciding whether the victim consented to the act, you should consider all of the evidence. It may help you to think about the following questions:
 - a) Was the victim free to leave and not take part in the sexual act?
 - b) Did the defendant threaten the victim with present or future injury?
 - c) Did the defendant use force, violence, or coercion?
 - d) Did the defendant display a weapon?
 - e) [*Name any other relevant circumstances.*]*
- 4) If you find that the evidence raises a reasonable doubt as to whether the victim consented to the act freely and willingly, then you must find the defendant not guilty.

D. Burden of Proof

The prosecutor bears the burden of disproving consent beyond a reasonable doubt. *People v Thompson*, 117 Mich App 522, 528 (1982). To obtain a jury

*Other relevant circumstances may include a history of marital rape or domestic violence which might have induced the victim to consent to avoid future harm or punishment. See CJI2d 20.30 and MCL 750.520l.

instruction on consent, a defendant must first produce enough evidence to put consent in controversy. *Id.*

E. Consent Viewed From Victim's Standpoint

Consent is to be determined from the victim's subjective state of mind, not the defendant's reasonable belief that the victim consented. *People v Hale*, 142 Mich App 451, 453 (1985).

F. Jury Instructions on Consent

When drafting instructions on consent, a trial court must be mindful not to impermissibly shift the burden of proof to defendant. In *People v Ullah*, 216 Mich App 669, 677-678 (1996), the Court of Appeals upheld a jury instruction virtually identical to CJI2d 20.27, which stated that if the jury found that the evidence of consent raised a reasonable doubt concerning whether complainant consented freely and willingly, it "must find defendant not guilty." The Court stated that the "instruction did not state that defendant had the burden of proving or establishing a reasonable doubt. . . . [T]he instruction given . . . required acquittal if the jury found the evidence relating to consent raised a reasonable doubt concerning whether the complainant consented to the acts." *Id.* at 678. However, the jury instruction in *People v Thompson*, 117 Mich App 522 (1982), which the *Ullah* Court distinguished, did not pass muster, for it required acquittal only if the jury found the elements of consent proved. *Ullah, supra* at 678. Although the consent defense was interposed to a kidnapping charge, the jury instruction stated in part:

"First, that the victim's consent to go with the defendant was not obtained by fraud, duress or threats; and, secondly, that the victim's consent was present throughout the commission of the alleged offense. If you find both of those elements present, then you must return a verdict of not guilty to the charge of kidnapping." *Thompson, supra* at 528.

The *Thompson* Court held: "The instruction . . . erroneously suggested that the burden of proof on the issue of consent had shifted to defendant." *Id.* at 529. The Court recommended that, "[o]n remand, if the evidence introduced warrants instructions on consent as a defense to kidnapping or criminal sexual conduct, the instructions should indicate that the burden is on the prosecution to disprove consent beyond a reasonable doubt." [Emphasis added.] *Id.*

In *People v Johnson*, 128 Mich App 618, 623 (1983), a case involving CSC III (force or coercion), the Court of Appeals found, in the absence of a defense objection at trial, no manifest injustice where the trial court merely informed the jury of defendant's theory of consent "but did not define consent or inform the jury what effect a finding of consent would have on defendant's guilt." The Court found that the "force or coercion" instruction "implicitly required the jury to find that the complainant did not consent to sexual intercourse before it could find defendant guilty." *Id.*

4.8 Duress

*The duress defense is specifically authorized within the crimes of prison escape, MCL 768.21b(4), and kidnapping, MCL 750.349. See CJI2d 7.7 for a list of special factors for escape cases.

The duress defense, while not often asserted in sexual assault cases, may arise in situations where the defendant, as an aider and abettor or conspirator to the sexual assault, or even as the principal, is threatened with imminent bodily harm or death by one of the perpetrators if he or she does not perform a sexual act upon the victim or someone else.

Duress is a common-law affirmative defense. See MCR 2.111(F)(3)(a); and *People v Lemons*, 454 Mich 234, 245 (1997). If successful, it “excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act” See *People v Luther*, 394 Mich 619, 622 (1975); and *Lemons*, *supra* at 245-246. However, duress may not be interposed as a defense to all crimes. It is “applicable in situations where the crime committed avoids a greater harm.” *People v Ramsdell*, 230 Mich App 386, 400-401 (1998), quoting *Lemons*, *supra* at 246. Thus, duress is not a defense to homicide. *People v Moseler*, 202 Mich App 296, 299 (1993). Nor is it a defense to possession of a dangerous weapon by an inmate. *People v Rau*, 174 Mich App 339, 342 (1989).*

Note: Duress is not the same as necessity. “The difference between the defenses of duress and necessity is that the source of compulsion for duress is the threatened conduct of another human being, while the source of compulsion for necessity is the presence of natural physical forces.” *People v Hubbard*, 115 Mich App 73, 77 (1982), quoting *People v Hocquard*, 64 Mich App 331, 337 n 3 (1975).

A. Elements of Defense

*The elements of duress are also contained in CJI2d 7.6.

The elements of duress are set forth in *People v Lemons*, 454 Mich 234, 247 (1997):*

“(A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

“(B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

“(C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and,

“(D) The defendant committed the act to avoid the threatened harm.”

Note: Although not explicitly delineated in the elements above or in CJI2d 7.6, a threat of future injury is insufficient to support a duress defense. *People v Ramsdell*, 230 Mich App 386, 401 (1998). The threatening conduct must be present, imminent, and impending. *People v Richter*, 54 Mich App 598, 605 (1974); see also CJI2d 7.6’s Commentary (“[T]he compulsion must be present, imminent and impending, and of such a nature as to induce a well-founded apprehension of death or serious bodily harm if the act is not done.”) Additionally, the threatening conduct must have arisen without the negligence or fault of the person who relies on it as a defense. *Lemons*, *supra* at 247.

B. Factors That May Cause a Defendant to Forfeit a Duress Defense

The Michigan Supreme Court, in *People v Lemons*, 454 Mich 234, 247 n 18 (1997), citing 1 LaFave & Scott, *Substantive Criminal Law*, § 5.3, p 619-620, provided a list of factors that may cause a defendant to forfeit the duress defense:

- F If defendant does not take advantage of a reasonable opportunity to escape, where it can be done without exposing himself unduly to death or seriously bodily harm; and
- F If defendant fails to terminate his or her conduct as soon as the claimed duress has lost its coercive force.

C. Burden of Proof

To properly raise this affirmative defense, the defendant must introduce some evidence from which the jury could conclude that the elements of duress are satisfied. *People v Luther*, 394 Mich 619, 623 (1975). See also *People v Lemons*, 454 Mich 234, 248 (1997) (“[b]efore a defendant is entitled to an instruction on the defense of duress, he must establish a *prima facie* case of the . . . elements of that defense . . .”), quoting *United States v Beltran-Rios*, 878 F2d 1208, 1213 (CA 9, 1989). Once the defense is successfully raised, the prosecutor must prove beyond a reasonable doubt that the defendant did not act under duress. See *People v Terry*, 224 Mich App 447, 453-454 (1997); and CJI2d 7.6(5).

A duress instruction is not warranted where a defendant, although beaten and controlled by another person, denies engaging in the alleged criminal conduct. In *Lemons*, *supra*, a companion case involving a husband and wife each convicted of three counts of CSC I against their children and stepchildren, the Michigan Supreme Court held that the defendant wife was not entitled to a duress jury instruction where she denied committing any sexual abuse against the children, even though she claimed that her husband beat her, that she was in fear of her husband, and that her husband controlled the household. The defense counsel argued that a duress instruction should have been given because the jury could have disbelieved the wife’s testimony and credited the testimony regarding the husband’s abuse and intimidation of the wife. The Supreme Court disagreed, stating:

“The defendant, without offering other evidence to support a critical element of the affirmative defense, explicitly denied that the act ever occurred, thus negating any claim that acts were justified by her actual fear. Since she failed to provide a basis for the jury to find that the acts were committed by her to avoid a greater harm, tendering the duress instruction would have permitted the jury to engage in speculation.” *Id.* at 251.

4.9 Impossibility

The doctrine of impossibility does not constitute a defense to the inchoate offenses of attempt to commit an offense under MCL 750.92 and solicitation to commit a felony under MCL 750.157b. *People v Thousand*, 465 Mich 149, 151-152 (2001) (*Thousand II*). Furthermore, the Michigan Supreme Court in *Thousand II* stated explicitly that it has *never* recognized or adopted the doctrine of impossibility as a defense. *Id.* at 152, 172.

*See Section 4.11 for information on the mistake-of-fact defense.

Note: In *Thousand II*, the Michigan Supreme Court explained the impossibility defense as follows: “The doctrine of ‘impossibility’ as it has been discussed in the context of inchoate crimes represents the conceptual dilemma that arises when, because of the defendant’s mistake of fact* or law, his actions could not possibly have resulted in the commission of the substantive crime underlying an attempt charge.” *Id.* at 156.

In *Thousand II*, the defendant allegedly used an Internet “chat room” to engage in sexually explicit language with an undercover police officer who posed as a 14-year-old girl named “Bekka.” The defendant allegedly sent, via the Internet, a picture of male genitalia to the victim. Defendant was charged with (1) attempted distribution of obscene material to a minor; (2) solicitation to commit CSC III; and (3) child sexually abusive activity—all of which were dismissed by the circuit court on defendant’s motion to quash. The Court of Appeals affirmed the dismissal of the first two charges, but reversed the dismissal of (or in other words, reinstated) the third charge, child sexually abusive activity. On a prosecution appeal to the Supreme Court, defendant argued that the Court of Appeals properly affirmed the trial court’s dismissal of his charges—attempted distribution of obscene material to a minor and solicitation to commit CSC III (victim 13-15)—based upon the doctrine of impossibility. He argued that the evidence against him was legally insufficient to support either charge because the existence of a child victim was an element in each charge.

On the attempted distribution of obscene material to a minor charge, the defendant argued that because “Bekka” was in fact an adult, an element of the underlying offense (dissemination to a minor) was not met and therefore it was legally impossible to commit the crime. To support his argument that impossibility was a judicially recognized defense in Michigan, and that it specifically applied to attempt crimes, defendant relied upon the following language in *People v Tinsky*, 394 Mich 108 (1975), a case where the Supreme Court reversed two defendants’ convictions for conspiracy to commit abortion on a woman who was not pregnant:

“It is possible, although we need not decide, that defendants could not have been convicted of attempted abortion; at common law the general rule is that while factual impossibility is not a defense . . . legal impossibility is a defense.” *Thousand II*, *supra* at 163, quoting *Tinsky*, *supra* at 108. [Citations omitted.]

The Supreme Court in *Thousand II* disagreed with the proposition that impossibility could be applied to attempt crimes; it also refused to be constrained by the language in *Tinskey*:

“We begin by noting that the concept of ‘impossibility,’ in either its ‘factual’ or ‘legal’ variant, has never been recognized by this Court as a valid defense to a charge of attempt. . . .

“As is readily apparent, our statement in *Tinskey* regarding ‘legal impossibility’ as a defense to an attempt charge is nothing more than obiter dictum. The defendants in *Tinskey* were not charged with attempt; rather, they were charged with statutory conspiracy. Moreover, we *specifically declined* in *Tinskey* to express any opinion regarding the viability of the ‘impossibility’ defense in the context of attempts. No other Michigan Supreme Court case has referenced, much less adopted, the impossibility defense.” *Id.* at 162-163. [Emphasis in original.]

On the solicitation to commit CSC III (victim 13-15) charge, the defendant argued that the defense of impossibility negated criminal liability. The Supreme Court disagreed:

“As we have explained, Michigan has never adopted the doctrine of impossibility as a defense in its traditional *attempt* context, much less in the context of *solicitation* crimes. Moreover, we are unable to locate any authority, and defendant has provided none, for the proposition that ‘impossibility’ is a recognized defense to a charge of solicitation in other jurisdictions.” *Id.* at 168. [Emphasis in original.]

Although it declined to adopt the doctrine of impossibility as a defense to solicitation, the Supreme Court held that the solicitation charge against defendant was properly dismissed because there was no evidence that defendant solicited anyone to “commit a felony” or “to do or omit to do an act which if completed would constitute a felony.” *Id.* at 168-169. Defendant only solicited the victim. The Supreme Court stated that while it would be a crime for defendant to engage in sexual intercourse with a 14-year-old girl, it would not be a crime, or at least not a CSC III crime, for either the undercover police officer or the on-line persona of “Bekka” to engage in sexual intercourse with an adult. *Id.* at 169. Accordingly, because an element of the statutory offense was missing, the Supreme Court held that the charge was properly dismissed. *Id.*

In *People v Meyers*, 250 Mich App 637 (2002), the Court of Appeals distinguished *Thousand II* and held that pure “legal impossibility” is still a viable defense in Michigan. In *Meyers*, the defendant engaged in conduct similar to the defendant in *Thousand II*: he logged onto an Internet chatroom and engaged in a discussion about oral sex with a person he believed to be a 12-year-old girl but who was in reality a police detective. Defendant pled guilty to MCL 750.145d(1)(b), unlawful Internet use, for using the Internet to communicate with a person for the purpose of attempting to commit conduct proscribed under MCL 750.145a (i.e., oral sex with a minor, which constitutes “gross indecency”). The trial court ordered defendant to register under the

Sexual Offender Registration Act (SORA), despite MCL 750.145d not being a “listed offense” under the Act. On appeal, defendant asserted the impossibility doctrine, applying it to the SORA’s registration requirements rather than his conviction. Defendant argued that the Legislature did not intend to have individuals register under SORA if the impossibility doctrine applied to their crimes; in other words, defendant argued that the Legislature intended to allow impossibility as an exception to SORA’s registration requirements. (Defendant claimed it was impossible for him to have attempted to accost a child using the internet because the person he was actually conversing with was not a child.) On appeal, the Court of Appeals assumed, for the sake of its analysis, that “attempts” under the convicted offense require the same proof as an attempt under MCL 750.92, the general attempt statute, which was the statute at issue in *Thousand II*. However, the Court of Appeals distinguished *Thousand II*, and held that the Supreme Court in *Thousand II* only disposed of two of three types of “impossibility”: factual and hybrid legal. The Court of Appeals found that “legal impossibility” is still a viable defense in Michigan:

“The *Thousand II* opinion, though written broadly in the sense that it stated and reiterated that the Supreme Court had never adopted an “impossibility” doctrine, . . . appears to have left intact pure legal impossibility as a valid defense Indeed, the language of MCL 750.92 [the general attempt statute] requires a defendant to have the intent to commit conduct that is criminal and to take steps to that end. Though a defendant may have a specific intent to commit certain actions and take steps to that end, if those actions are legal, then it would be impossible to say that the defendant attempted ‘to commit an offense prohibited by law’ even if the defendant thought he was committing a crime. . . . This case does not involve pure legal impossibility because the law prohibited the conduct Meyers intended to commit. . . .” *Meyers, supra* at 654 n 44.

*See Section 11.2 for further discussion of the *Meyers* case as it relates to sex offender registration.

The Court of Appeals held that, despite defendant’s efforts to portray the case as one involving pure legal impossibility, the case involved only hybrid legal impossibility, a doctrine disposed of (along with factual impossibility) by *Thousand II*. The Court of Appeals concluded hybrid legal impossibility was involved because “Meyers had an illegal goal, which his factual mistake concerning the identity of the person with whom he was chatting on the internet made legally impossible for him to accomplish.” *Meyers, supra* at 655. The Court of Appeals held that defendant must register under SORA’s catch-all provision, and that hybrid legal impossibility has no bearing on whether defendant falls within the catch-all provision.* *Id.*

4.10 Insanity, Guilty But Mentally III, Involuntary Intoxication, and Diminished Capacity

This section addresses the following defenses:

F Insanity.

- F Findings of “guilty but mentally ill.”
- F Involuntary intoxication.
- F Diminished capacity (abrogated by *People v Carpenter*, 464 Mich 223 (2001)).

A. Insanity Defense

MCL 768.21a(1) governs the insanity defense:

“It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of *mental illness* as defined in [MCL 330.1400a] or as a result of being *mentally retarded* as defined in [MCL 330.1500], that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.” [Emphases added.]

Note: MCL 768.21a(1) references MCL 330.1400a for the definition of “mental illness.” However, MCL 330.1400a was repealed by 1995 PA 290. For purposes of the insanity statute, the definition in MCL 330.1400(g) should be used. *People v Mette*, 243 Mich App 318, 325 (2000). MCL 768.21a(1) also references MCL 330.1500 for the definition of “mentally retarded.” However, MCL 330.1500 no longer contains a definition of “mentally retarded.” Substantially similar definitions of “mentally retarded” appear in the Mental Health Code at MCL 330.2001a(6), and in the Penal Code at MCL 750.520a(i).

“Mental illness,” as defined in MCL 330.1400(g), means:

“a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

“Mentally retarded,” as defined in MCL 330.2001a(6), means:*

“significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior.”

1. Burden of Proof

The defendant has to prove the affirmative defense of insanity by a preponderance of evidence. MCL 768.21a(3).*

*A substantially similar definition also appears in MCL 750.520a(i) of the Penal Code.

*1994 PA 56 amended Michigan’s insanity statute to shift the burden of proof to the defense.

2. Elements of Defense

CJI2d 7.11(6) lists the following elements of legal insanity that must be proven by the defendant by a preponderance of evidence:

- (1) That defendant was mentally ill or mentally retarded at the time of the offense; and
- (2) That defendant was legally insane at the time of the offense, i.e., that he or she, because of being mentally ill or mentally retarded, lacked substantial capacity to appreciate the nature and quality of the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.

The second-part of this test comprises two prongs. The first prong, known as the cognitive prong, refers to the situation where a defendant lacks “substantial capacity . . . to appreciate the nature and quality of [the wrongfulness] of his or her conduct.” *People v Jackson*, 245 Mich App 17, 19 n 1 (2001), quoting Dressler, *Understanding Criminal Law*, § 25.04[C][1][a], p 299. The second prong, known as the volitional prong (and formerly as the “irresistible impulse” prong), refers to the situation where a defendant lacks “substantial capacity” to conform his or her conduct to the requirements of the law. *Id.* at 20.

3. “Policeman at the Elbow” Standard

When considering the volitional prong of the insanity defense,* trial courts may use what is known as the “policeman at the elbow” standard—i.e., a line of inquiry that asks whether a defendant would have committed the crimes had there been a policeman at his elbow. However, this “policeman at the elbow” standard is not dispositive to the issue of legal insanity, and should only be one avenue of inquiry into whether a person is legally insane. *Id.* at 21.

In *Jackson*, the prosecutor cross-examined a defense forensic clinical psychologist who testified that defendant would not have committed the offense had one of the court deputies—a “policeman at the elbow”—been present at the time of offense. The trial court found defendant guilty but mentally ill of CSC I and Child Abuse I, instead of finding him not guilty by reason of insanity. On appeal, defendant argued that the trial court committed reversible error by relying solely on the “policeman at the elbow” standard when it considered the volitional prong of the statutory insanity test. The Court of Appeals found that the trial court, despite its disclaimer to the opposite, treated the defense expert testimony as dispositive on the issue of insanity. Nevertheless, the Court of Appeals found no error in the trial court’s ultimate conclusion that defendant was not legally insane, finding that the “policeman at the elbow” standard was merely one avenue of inquiry used by the court for a determination of legal insanity. The Court of Appeals acknowledged that the trial court did indeed look at other evidence: defendant’s admission that he could control his conduct when in front of other people; and that he took his son to the bathroom on the night when the charged acts occurred because he did not want others to hear what was going on, which

*See the preceding subsection for discussion on the volitional prong.

was an indication that defendant understood the pervasive societal prohibitions against such conduct. *Id.* at 25.

4. Voluntary Intoxication Precludes Finding of Insanity Unless Individual Rendered Permanently Insane From Substance Abuse

Under the insanity statute, “[a]n individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.”* MCL 768.21a(2).

*See Section 4.13 for more information on voluntary intoxication.

The exception above does not apply if the voluntary and continued use of a mind-altering substance results in a settled condition of insanity before, during, or after the alleged offense. *People v Caulley*, 197 Mich App 177, 187 n 3 (1992). See also *People v Conrad*, 148 Mich App 433, 438 (1986), lv den 424 Mich 908 (1986) (The insanity statute “does not automatically preclude for all time the assertion of an insanity defense if a person is *rendered insane* by the voluntary ingestion of a drug.” [Emphasis in original.]) In *Conrad*, the defendant was found guilty but mentally ill of second-degree murder for killing his younger brother. At trial, he interposed an insanity defense based upon his voluntary use of phencyclidine (PCP) four or five times in the two weeks preceding the murder. The trial court rejected defendant’s insanity defense, claiming that defendant’s use of PCP was voluntary and thus prohibited him from asserting an insanity defense under MCL 768.21a(2). On appeal, the Court of Appeals held that defendant was denied a fair trial when the trial court rejected his insanity defense, stating “[I]f a defendant is actually and demonstrably rendered insane by the ingestion of mind-altering substances, an insanity defense is not absolutely precluded.” *Conrad, supra* at 441.

In *People v Matulonis*, 115 Mich App 263 (1982), the Court of Appeals held that defendant’s long-term voluntary intoxication that resulted in physical brain deterioration could form the basis of a viable insanity defense. Compare, however, *People v Hunt*, 170 Mich App 1, 13-14 (1988), in which the Court of Appeals found no ineffective assistance of counsel where the defense attorney failed to develop an insanity defense based upon defendant’s alleged cocaine addiction being a drug dependency.

5. Notice and Examination Requirements

The defendant in a felony case must file and serve on the prosecutor and the court written notice of intent to claim an insanity defense no less than 30 days before the trial date, or at such other time as the court directs. MCL 768.20a(1).

Upon receipt of the notice, the trial court must order the defendant to undergo an examination for a period not to exceed 60 days by the Center for Forensic Psychiatry or other qualified personnel. MCL 768.20a(2). Both parties also

may obtain independent psychiatric examinations. MCL 768.20a(3). See, however, *People v Smith*, 103 Mich App 209, 210-211 (1981) (the trial court properly denied defendant's request for an independent examination made on the day of trial.) An indigent defendant is entitled to one independent examination at public expense. See MCL 768.20a(3); and *Ake v Oklahoma*, 470 US 68, 78-79, 83 (1985).

6. Sanctions for Non-Compliance with Notice and Examination Requirements

A defendant's failure to fulfill the statutory notice provisions or the provisions requiring the naming of witnesses requires the trial court to exclude the evidence offered by the defendant to establish insanity. MCL 768.21(1). However, strict compliance with the statutory notice requirements regarding an insanity defense may not be necessary, where the parties have actual notice of witnesses who may be called and no surprise will result from noncompliance. See *People v Blue*, 428 Mich 684, 690 (1987); *People v Stinson*, 113 Mich App 719, 723-726 (1982) (the trial court properly ordered a one-week adjournment of trial to allow the prosecutor to file a notice of rebuttal, where defense counsel was aware of the prosecutor's intent to call an expert witness); and *People v Jurkiewicz*, 112 Mich App 415, 417 (1982) (prosecutor's failure to file notice of rebuttal or request permission to file a late notice of rebuttal required exclusion of witness's testimony).

7. An Unincarcerated Defendant's Required Cooperation With the Examination

An incarcerated defendant must make himself or herself available "at the place and time established by the center [for forensic psychiatry] or the other qualified personnel" for a psychiatric examination. MCL 768.20a(2). If a defendant, after being notified of the time and place of the examination, fails to make himself or herself available, the court may, without a hearing, commit defendant to the Center for Forensic Psychiatry. *Id.* If the defendant appears for the examination as required but fails to cooperate during the examination, and the failure is "established to the satisfaction of the court at a hearing prior to trial, the defendant shall be barred from presenting testimony relating to his or her insanity at . . . trial. . . ." See MCL 768.20a(4); and *People v Hayes*, 421 Mich 271, 282 (1985).

8. Psychiatric Examination Report and Rebuttal Notice

After the psychiatric examination is conducted, the examiner must prepare a written report and submit it to the prosecuting attorney and defense counsel. MCL 768.20a(6). It must contain the following information:

"(a) The clinical findings of the center [for forensic psychiatry], the qualified personnel, or any independent examiner.

"(b) The facts, in reasonable detail, upon which the findings were based.

“(c) The opinion of the center or qualified personnel, and the independent examiner on the issue of the defendant’s insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed.” MCL 768.20a(6)(a)-(c).

Within ten days of receipt of the report from the forensic center or the prosecutor’s independent examiner, whichever occurs later, but no less than five days before trial, or at such other time as the court directs, the prosecutor must file and serve notice of rebuttal, including witness names. MCL 768.20a(7).

9. A Defendant’s Statements Made During Examination Are Privileged

MCL 768.20a(5) provides:

“Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense.”

Such statements cannot be used for impeachment purposes. *People v Toma*, 462 Mich 281, 293 (2000). However, the Michigan Supreme Court in *Toma* provided no opinion on whether MCL 768.20a(5) prevents impeachment of a defendant who commits perjury on the witness stand, although it did add that a defendant has no right to testify falsely. *Toma*, *supra* at 293 n 7, citing *People v Adams*, 430 Mich 679, 694 (1988).

10. Retroactive Application

Retroactive application of the insanity statute to offenses committed before the 1994 amendment (1994 PA 56) violates the Ex Post Facto Clauses of the United States and Michigan Constitutions. *People v McRunels*, 237 Mich App 168, 171, 189 (1999).

B. “Guilty But Mentally Ill”

According to the Michigan Supreme Court, Michigan’s insanity defense is “all or nothing,” and thus a defendant who is mentally ill or retarded can only be deemed legally insane *or* guilty but mentally ill.* *People v Carpenter*, 464 Mich 223, 237 (2001).

MCL 768.36 sets forth the requirements for, and the consequences of, finding an individual “guilty but mentally ill.” A guilty but mentally ill person is one who, although mentally ill at the time the offense was committed, was not legally insane.

*The diminished capacity defense, formerly part of the insanity defense, has been abrogated. *Carpenter*, *supra* at 237. See Section 4.10(D).

*MCL 768.36 was amended by 2002 PA 245, effective May 1, 2002.

*See CJI2d 7.12 for the definition of “guilty but mentally ill.”

*Under MCL 768.36(2), a judge is not entitled to examine the psychiatric reports unless the defendant consents. MCL 768.36(2).

*The jury instruction for the definition of “guilty but mentally ill” is contained in CJI2d 7.12.

MCL 768.36(1)* provides:

“If the defendant asserts a defense of insanity in compliance with section 20a [MCL 768.20a], the defendant may be found ‘guilty but mentally ill’ if, after trial, the trier of fact finds all of the following:

“(a) The defendant is guilty beyond a reasonable doubt.

“(b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.

“(c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.*

Note: 2002 PA 245 amended MCL 768.36 principally to specify that a defendant now has the burden of proof by preponderance of the evidence to establish that he or she was mentally ill at the time of the commission of the offense.

1. Accepting Pleas of “Guilty But Mentally Ill”

With the consent of the court and prosecutor, a defendant may plead “guilty but mentally ill.” MCR 6.301(A) and (C). However, before the court accepts such a plea, the defendant must first undergo a psychiatric examination pursuant to the requirements set forth under MCL 768.20a. See MCR 6.301(C)(1) and MCL 768.36(2).

MCR 6.303 details the procedure for accepting guilty but mentally ill pleas:

“Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302 [the rule governing plea requirements]. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill, but not insane, at the time of the offense to which the plea is entered. The reports must be made a part of the record.”*

2. Jury Instructions

If a jury is instructed on the insanity defense, it must also be instructed on the definition of “guilty but mentally ill” as an alternative verdict. MCL 768.29a(2) provides:*

“At the conclusion of the trial, where warranted by the evidence, the charge to the jury shall contain instructions that it shall consider separately the issues of the presence or absence of mental illness and the presence or absence of legal insanity and *shall also contain instructions as to the verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged and, as required by law, any lesser included offenses.*” [Emphasis added.]

3. Sentencing Considerations

If the defendant is found “guilty but mentally ill,” or enters a plea to that effect, the trial court must “impose any sentence that could be imposed by law upon a defendant who is convicted of the same offense.” MCL 768.36(3). See also *People v Carpenter, supra* at 237 (defendant must be sentenced in the “same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment” by the Department of Corrections or Department of Mental Health, as described in MCL 768.36(3)).

If the defendant is sentenced to incarceration under the Department of Corrections, he or she must undergo further evaluation and be “given such treatment as is psychiatrically indicated for his mental illness or retardation,” which must be administered by either the Department of Corrections or the Department of Mental Health. MCL 768.36(3). If the defendant is paroled, “the defendant’s treatment shall, upon recommendation of the treating facility, be made a condition of parole. Failure to continue treatment except by agreement with the designated facility and parole board is grounds for revocation of parole.” *Id.*

If the defendant is placed on probation, the trial judge must, upon recommendation of the Center for Forensic Psychiatry, make treatment a condition of probation. MCL 768.36(4). Furthermore, the period of probation must not be for less than five years and must not be shortened without receipt and consideration of a forensic psychiatric report. *Id.*

C. Involuntary Intoxication

There are two types of intoxication defenses in Michigan: voluntary and involuntary.* Involuntary intoxication is a defense solely within the ambit of the insanity defense, including its substantive and procedural requirements. *People v Wilkins*, 184 Mich App 443, 449 (1990).

“Involuntary intoxication” is “‘intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant.’” *People v Caulley*, 197 Mich App 177, 187 (1992), quoting *People v Low*, 732 P2d 622, 627 (Colo, 1987). “Intoxication” is a “‘disturbance of mental or physical capacities resulting from the introduction of *any* substance into the body.’” [Emphasis added.] *Id.* The defense of involuntary intoxication is available as a defense when the chemical effects of drugs or alcohol render a defendant temporarily insane. *Caulley, supra* at 187, citing *Wilkins, supra* at 449.

Prescription medications can cause a drug dependency that may be deemed involuntary intoxication. According to the Court of Appeals in *Caulley, supra* at 188, when a defendant’s drug dependency is from prescription medications,

*See Section 4.13 for more information on voluntary intoxication. For more information on how voluntary intoxication can form a basis for a finding of legal insanity, see Section 4.10(A)(4).

the following conditions must be met to interpose the defense of involuntary intoxication:

- (1) Defendant must not know or have reason to know that the prescribed drug is likely to have the intoxicating effect;
- (2) The prescribed drug, not another intoxicant, must have caused the defendant's intoxicated condition; and
- (3) Defendant must establish that as a result of the intoxicated condition, he or she was rendered temporarily insane.

D. Diminished Capacity

*As a result of the holding in *Carpenter*, the jury instruction regarding the diminished capacity defense has been deleted. See CJI2d 6.3.

Michigan's so-called diminished capacity defense, which allows evidence of mental incapacity short of insanity to be used to avoid or reduce criminal responsibility by negating specific intent, has been abrogated by the Supreme Court in *People v Carpenter*, 464 Mich 223 (2001).^{*} Although the defense was once part of Michigan's comprehensive statutory framework governing the insanity defense, the Supreme Court in *Carpenter* held that the Legislature demonstrated its policy choice by eliminating diminished capacity as a defense and by creating an "all or nothing insanity defense," in which a "mentally ill" or "mentally retarded" defendant can *only* be legally insane or guilty but mentally ill:

"We conclude that, through this [comprehensive statutory] framework, the Legislature has created an all or nothing insanity defense. Central to our holding is the fact that the Legislature has already contemplated and addressed situations involving persons who are mentally ill or retarded yet not legally insane. As noted above, such a person may be found 'guilty but mentally ill' and must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment. MCL 768.36(3)." *Id.* at 237.

The defense of voluntary intoxication was not at issue in *Carpenter*. Although it is not part of the insanity defense, many consider voluntary intoxication to be a diminished capacity defense because it can be used to negate a defendant's specific intent. However, the Legislature enacted MCL 768.37, effective September 1, 2002, which eliminates the defense of voluntary intoxication except in narrow circumstances. See Section 4.13 for further discussion of voluntary intoxication.

Note: Before the enactment of MCL 768.37, the Michigan Supreme Court recognized the continued viability of the voluntary intoxication defense in a footnote in *Carpenter*:

"We decline the dissent's invitation to address our prior decisions recognizing voluntary intoxication as negating specific intent, see, e.g., *People v Langworthy*, 416 Mich 630 (1982), as the continued validity of that separate and distinct defense is not before us." *Carpenter*, *supra* at 239 n 10.

4.11 Mistake of Fact

A defendant's mistake of fact,* if reasonable and in good faith, may negate the state of mind necessary to commit the crime and thus negate criminal liability. Michigan appellate cases have ruled on the applicability of the mistake-of-fact defense in CSC offenses where (1) a victim's "mental" or "physical" condition is an element of the offense; and where (2) a victim's age is an element of the offense.

A. Offenses Requiring Proof That a Victim Is "Mentally ill," "Mentally Retarded," "Mentally Disabled," "Mentally Incapable," "Mentally Incapacitated," or "Physically Helpless"

A mistake-of-fact defense applies to CSC offenses that reference a victim's "mental" and "physical" condition if the provision requires that the defendant "knows or has reason to know" of the victim's mental or physical condition. With this "knows or has reason to know" language, a defendant who makes a *reasonable* mistake as to the victim's mental or physical condition will not be criminally liable. *People v Davis*, 102 Mich App 403, 407 (1980).

The mistake-of-fact defense *applies* to the following CSC "mental" elements:

F First- and second-degree criminal sexual conduct

- The actor is aided and abetted by one or more other persons and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(d)(i) (CSC I); and MCL 750.520c(1)(d)(i) (CSC II).
- The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(g) (CSC I); and MCL 750.520c(1)(g) (CSC II).

F Third-degree criminal sexual conduct

- The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520d(1)(c).

F Fourth-degree criminal sexual conduct

- The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520e(1)(c).

Because the following CSC elements do not contain the "knows or has reason to know" language, the mistake-of-fact defense *does not* apply:

F First- and second-degree criminal sexual conduct

- The victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and the actor is related to the

*A mistake of fact may also form a basis for an impossibility defense. See Section 4.9 for more information on the impossibility defense.

victim by blood or affinity to the fourth degree or the actor is in a position of authority to coerce the victim to submit. MCL 750.520b(1)(h)(i)-(ii) (CSC I); and MCL 750.520c(1)(h)(i)-(ii) (CSC II).

In *Davis, supra*, the defendant was convicted of CSC III (“knows or has reason to know” victim is mentally defective, mentally incapacitated, or physically helpless) for having the victim, a woman suffering from chronic schizophrenia, perform fellatio on him consensually. On appeal, defendant claimed he did not commit the crime; alternatively he argued that he was so intoxicated he could not have known, nor should he have had reason to know, of the victim’s mental condition. Defendant also argued that the element containing the language “knows or has reason to know” makes CSC III a specific intent crime and consequently the trial court erred by not instructing the jury on voluntary intoxication. The Court of Appeals, after finding that the “knows or has reason to know” language does not mandate proof of specific intent and thus negates a voluntary intoxication defense, wrote the following:

“It is our belief that by including the ‘knows or has reason to know’ language, the Legislature did not desire to excuse a defendant who is unreasonable in his conclusion that the victim could consent to the sexual penetration. Rather, we believe that the Legislature was desirous of protecting individuals who have sexual relations with a partner who appears mentally sound, only to find out later that this is not the case. A mental illness . . . is not necessarily always apparent to the world at large. For instance, a woman who suffers from a multiple personality defect might seem ‘normal’ in each of her personality manifestations, yet, from a psychological perspective, be unable to appraise the nature of her conduct. Similarly, an individual suffering from schizophrenia may have periods of relative lucidity and normalcy intermingled with periods when the mental disorder is evident. *We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons.*” [Emphasis added.] *Id.* at 406-407.

In *People v Baker*, 157 Mich App 613 (1986), the defendant was convicted of CSC I (personal injury and “knows or has reason to know” victim is mentally incapable, mentally incapacitated, or physically helpless) for engaging in sexual intercourse with a mentally impaired woman. On appeal, defendant claimed that the trial court should have instructed the jury to analyze his subjective perception and evaluation of the victim’s mental incapacity, and not apply a “reasonable person” standard. The Court of Appeals, relying upon *Davis, supra*, rejected defendant’s argument and held that the statute requires a reasonable person or objective standard. *Id.* at 615.

B. Offenses Requiring Proof of Victim’s Age

The CSC Act’s “age” offenses are strict liability crimes. In *re Hildebrant*, 216 Mich App 384, 386 (1996). Thus, a defendant’s reasonable mistake of fact as to the victim’s age is not a defense under the CSC Act.

In *People v Cash*, 419 Mich 230 (1984), the defendant was convicted of CSC III (victim 13-15), for engaging in sexual intercourse with a 15-year-old girl, who told the defendant she was 17. On appeal, after rejecting defendant's argument that he was entitled to a reasonable-mistake-of-age jury instruction, the Michigan Supreme Court held the following:

"We find that the Legislature intentionally omitted the defense of a reasonable mistake of age from its statutory definition of third-degree criminal sexual conduct involving a 13- to 16-year-old.* Moreover, we hold that this defense is not constitutionally compelled." *Id.* at 250.

Although *Cash* was decided under the CSC III (victim 13-15) statute, its rationale presumably applies to all CSC offenses containing that age group and also to those offenses containing an under 13 age group. As to this last group, the Supreme Court in *Cash* stated that the same policy reasons for removing a mistake-of-fact defense in the 13-15 age group apply with even greater force to the under 13 age group. *Id.* at 234 n 1.

The Supreme Court also noted that the Legislature could have provided a reasonable mistake of age defense by adding the "knows or has reason to know" language to the CSC Act's age elements, which it did for other elements:

"Had the Legislature desired to revise the existing law by allowing for a reasonable-mistake-of-age defense, it could have done so, but it did not do so. This is further supported by the fact that under another provision of the same section of the statute, concerning the mentally ill or physically helpless rape victim, the Legislature specifically provided for the defense of a reasonable mistake of fact by adding the language that the actor 'knows or has reason to know' of the victim's condition where the prior statute contained no requirement of intent. The Legislature's failure to include similar language under the section of the statute in question indicates to us the Legislature's intent to adhere to the *Gengels** rule that the actual, and not the apparent, age of the complainant governs in statutory rape offenses." *Id.* at 241.

*CSC III's age element requires that the age of the victim be 13 years old or older but under 16 years old. MCL 750.520d(1)(a). See also Sections 2.2(B) and 2.5(B).

**People v Gengels*, 218 Mich 632 (1922).

4.12 Statute of Limitations

MCL 767.24 governs periods of limitations for Michigan crimes, unless the specific crime contains its own limitations period. *People v Budnick*, 197 Mich App 21, 27 (1992), citing *People v Clement*, 72 Mich 116 (1888). A statute of limitations defense is a nonjurisdictional, waivable affirmative defense. *People v Burns*, 250 Mich App 436, 439 (2002). The following subsections address limitations periods, applicable crimes, and pertinent case law.

A. Crimes With No Limitations Period

MCL 767.24(1) provides that an indictment for any of the following crimes may be found and filed at any time:

- F Murder [No specific citation given in MCL 767.24(1)].
- F First-degree criminal sexual conduct, MCL 750.520b.
- F A violation of MCL 750.200 to 750.212a [governing explosives and bombs] that is punishable by life imprisonment.
- F A violation of MCL 750.543a to 750.543z [governing terrorist activities]. (Added by 2002 PA 119, effective April 22, 2002.)

B. Crimes With Ten-Year Limitation or By Victim's 21st Birthday

MCL 767.24(2)(a) provides that, except in cases involving DNA evidence from an unidentified individual, an indictment for a violation or attempted violation of any of the following statutes may be found and filed within ten years after the offense is committed or by the alleged victim's 21st birthday, whichever is later:

- F Child sexually abusive activity or material, MCL 750.145c.
- F Second-degree criminal sexual conduct, MCL 750.520c.
- F Third-degree criminal sexual conduct, MCL 750.520d.
- F Fourth-degree criminal sexual conduct, MCL 750.520e.
- F Assault with intent to commit criminal sexual conduct, MCL 750.520g.

There is no limitations period for a violation of any of the foregoing offenses if the offender is unidentified and DNA evidence is determined to be from that unidentified person. MCL 767.24(2)(b). However, if the individual is eventually identified,* the indictment shall be found and filed within ten years after the individual is identified or by the alleged victim's 21st birthday, whichever is later. *Id.*

Note: The foregoing DNA provision is *not* synonymous with the commonly known "John Doe/Jane Doe" warrants that are filed to toll the statute of limitations period by using an individual's genetic code as identification. The foregoing provision requires no such filing of a complaint and warrant because there is no limitations period, except when the individual is later identified by name. Once the individual is identified by name, the indictment must be filed within ten years after the identification is made. As of this Benchbook's publication date, no Michigan appellate court has recognized the filing of "John Doe/Jane Doe" DNA warrants in Michigan.

C. Ten-Year Limitation

MCL 767.24(3) provides that an indictment for a violation of any of the following statutes shall be found and filed within ten years after the offense is committed:

- F Kidnapping.

*"Identified" means the individual's legal name is known and the individual has been determined to be the source of the DNA. MCL 767.24(2)(c) (ii).

- F Extortion.
- F Assault with intent to commit murder.
- F Attempted murder.
- F Manslaughter.
- F Conspiracy to commit murder.
- F First-degree home invasion.

D. Six-Year Limitation

MCL 767.24(4) provides that “[a]ll other indictments shall be found and filed within 6 years after the offense was committed.”

E. Nonresident Tolling of Statute of Limitations

MCL 767.24(5) provides that “[a]ny period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments shall be found and filed.”

The Legislature expressed its intent for the applicability of this provision in a “Note” to 2001 PA 6, the public act amending MCL 767.24, by stating as follows:

“The legislature intends that the extension or tolling, as applicable, of the limitations period provided in this amendatory act shall apply to any of those violations for which the limitations period has not expired at the time this amendatory act takes effect.”*

*2001 PA 6 took effect May 2, 2001.

On its face, the foregoing note suggests that the nonresident tolling provision in MCL 767.24(5) can be applied to all unexpired limitations periods (as of May 2, 2001). This would include the six- and ten-year limitations periods as well as the 21st birthday limitation. However, this interpretation seems to contradict the case of *People v Budnick*, 197 Mich App 21, 26-27 (1992),* which held that the nonresident tolling provision does not apply to the 21st birthday limitation. In *Budnick*, the defendant was charged with CSC I against a ten-year-old minor nearly 15 years after the date of offense. Three years after the offense date, he began residing in Wisconsin and remained there for 12 years until he was charged in Michigan. On appeal, the Court of Appeals held that the nonresident tolling provision applied only to the six-year limitation period in question and not the 21st birthday limitation. Thus, while 12 of the 15 years were tolled under the six-year limitation period, nothing was tolled under the 21st birthday limitation. This led the Court to conclude that “the indictment brought against defendant, although untimely under the birthday limitation, was timely under the six-year limitation.” *Id.* at 27.

*At the time *People v Budnick* was decided, a CSC I indictment had to be filed within six years of the offense or by the victim’s 21st birthday, if the victim was under 18 at the time of offense, whichever was later.

*At the time *People v McIntire* was decided, a perjury indictment had to be filed within *six years* of the offense.

The nonresident tolling provision in MCL 767.24 operates to toll the limitations period when the suspect is not “usually and publicly” residing in Michigan, regardless of the suspect’s intent or purpose for leaving the state. In *People v McIntire*, 232 Mich App 71 (1998), rev’d on other grounds 461 Mich 147 (1999), the defendant was charged in August 1994 with open murder, felony firearm, and four counts of perjury for a homicide occurring in December 1982. In July 1984, after being given immunity and testifying at a “one-man grand jury,” defendant moved to South Carolina with his family and remained there until he returned to Michigan to face his charges between late 1994 and early 1995. Although he was convicted by jury of four counts of perjury, defendant’s open murder and felony firearm charges were dismissed by the circuit court. While the prosecutor appealed the dismissed charges, the defendant appealed his perjury convictions, arguing that despite his Michigan nonresidency, the nonresident tolling provision should not have tolled the six-year limitation period* because he did not leave Michigan to avoid prosecution, he lived openly in South Carolina, he was easy to locate, and his absence from Michigan did not impede the prosecutor from going forward with the case. The Court of Appeals rejected defendant’s arguments, holding that the nonresident tolling provision was “plain and unambiguous” and that the Legislature is presumed to have intended the meaning it plainly expressed. *Id.* at 98. The Court also held that “mere absence” from the state is not enough to toll the criminal period of limitation; instead, the absence must “destroy residency.” *Id.* at 99. The Court added that a suspect’s intent in leaving the state, even if it is to evade justice or to conceal his or her whereabouts, is irrelevant to the operation of the nonresident tolling provision. *Id.* at 99-100.

*At the time *People v Crear* was decided, a CSC I or CSC II indictment for victims under 18 had to be filed within *six years* of the offense or by the victim’s 21st birthday, whichever was later.

In *People v Crear*, 242 Mich App 158, 165 (2000), the defendant, a former band instructor at a middle school and high school, was charged in 1995 with three counts of CSC I and two counts of CSC II for sexually abusing a female middle-school band student over two years, from 1982-1984. In 1987, he moved to Florida and took a job as a high school band instructor, remaining there for eight years until he was charged in Michigan in 1995. On appeal, defendant argued that his prosecution was time-barred under the six-year limitation period* in MCL 767.24(1). He argued that the trial court should not have applied the nonresident tolling provision to toll the limitation period because he was residing in Florida “openly and publicly” and could have been extradited at any time. The Court of Appeals disagreed. In recognizing that *McIntire, supra*, was not binding precedent under MCR 7.215(H)(1) (later redesignated as MCR 7.215(I)) because it was reversed, the Court of Appeals nevertheless found the analysis persuasive and applicable and adopted it for use in this case. Accordingly, it concluded that “the trial court did not err in holding that the period of limitation was tolled after defendant moved to Florida in 1987 and that, consequently, the charges in this case were timely filed.” *Id.* at 165. The Court also found that the nonresident tolling provision did not impermissibly infringe on defendant’s constitutional right to travel. *Id.*

If a suspect leaves Michigan to reside in another state but later takes up residence in Michigan, the limitations period resumes running once the suspect is “usually and publicly” residing in Michigan. *Budnick, supra* at 27.

The tolling provision in MCL 767.24(5) does not specifically address whether the filing of an indictment/information operates to toll the limitations period in cases where the defendant never takes up residence in another state and where the indictment/information is filed within the limitations period and then dismissed and later reissued after the lapse of the limitations period. However, the Court of Appeals decided such a case in *People v Dalton*, 91 Mich App 246 (1979). In *Dalton*, the defendant was indicted within the limitations period* by a one-man grand jury for False Pretenses over \$100.00. The district court quashed the indictment because the grand jury had not taken testimony and because the prosecutor refused to comply with the discovery order. The prosecutor then re-charged the defendant under a complaint and warrant after the limitations period had expired. The trial court denied defendant’s motion to quash this information. On appeal, the Court of Appeals reversed and remanded to the trial court for a determination of whether the defendant ever absented himself from Michigan. The Court held that “[s]ince Michigan has no statute specifically providing for tolling while the improper indictment was pending, the statute continued to run.” *Id.* at 252.

*At the time *People v Dalton* was decided, the limitations period for False Pretenses was six years, and the tolling provision read “but any period during which the party charged was not usually and publicly resident within this state shall not be reckoned as part of the time within which the respective indictments shall be found and filed.” *Id.* at 249.

F. Commencement of Prosecution

The term “indictment” in MCL 767.24 includes a charge made by filing an information. *People v Russo*, 439 Mich 584, 588 n 1 (1992).

“The issuing of a warrant in good faith, and delivery to an officer to execute, is a sufficient commencement [of prosecution], if it appears that the defendant was afterwards arrested upon that warrant and bound over for trial.” *People v Clark*, 33 Mich 112, 119 (1876).

For a case on whether an offense is a “continuing offense” for purposes of the statute of limitations defense, see *People v Owen*, 251 Mich App 76 (2002), where the Court of Appeals reversed the trial court’s dismissal of a charge of concealing and storing a firearm contrary to MCL 750.535b(2), finding that the six-year statute of limitations defense did not bar the charge, since the crime of concealing (but not storing) a firearm by burying it underground for more than seven years is a “continuing offense” for purposes of the statute of limitations defense. *Owen, supra* at 84.

G. Factual Disputes Are Jury Questions

Factual disputes that involve a statute of limitations issue arising under MCL 767.24 are jury questions. Thus, it is proper for a trial court to refuse to rule as a matter of law on motions that are brought to decide these issues. In *People v Artman*, 218 Mich App 236, 239-240 (1996), the Court of Appeals upheld the trial court’s denial of defendant’s motion to dismiss on the question of

when the statutory crime of embezzlement occurred, holding that the issue whether the period of limitation had expired was a jury question. Also, in *People v Wright*, 161 Mich App 682, 686 (1987), the Court of Appeals upheld the trial court's denial of defendant's motion for directed verdict on the question of the running of the limitation period, likening the issue to venue in criminal proceedings, which is also a jury question. Finally, in *People v Allen*, 192 Mich App 592, 597 (1992), the Court of Appeals upheld the trial court's denial of defendant's motion to quash on the question of whether defendant was not "usually and publicly" residing in this state, holding that the issue was a jury question.

H. A Plea Waives Statute of Limitations Defense

An unconditional guilty or no contest plea waives the defendant's right to assert the statute of limitations defense, because, "even though the effect of a successful defense is to prevent the state from obtaining a conviction, the purpose of the statute relates to determining a defendant's factual guilt." *People v Allen*, 192 Mich App 592, 602 (1992). See also *People v Bulger*, 462 Mich 495, 517 n 7 (2000) ("By pleading guilty or nolo contendere, a defendant waives . . . statute of limitations claims.")

I. Retroactive Application of New Limitation Period

A trial court may retroactively apply an extended limitations period under MCL 767.24, if the offenses were not time-barred under the preamended limitations period at the time the extended limitations period became effective. In *People v Chesebro*, 185 Mich App 412 (1990), the Court of Appeals held that the trial court improperly dismissed a CSC I charge involving an 11-year-old complainant as time-barred after it applied a preamended six-year limitations period* in effect *at the time of the alleged offense*. The Court of Appeals reversed and reinstated the charge, holding that the trial court should have applied the amended period of limitation, which would have allowed the charge to be filed by the victim's 21st birthday, because this amended period of limitation became effective one month before the preamended six-year period expired and defendant thus acquired no right to a statute of limitations defense. The Court of Appeals, however, stated that the case might have been decided differently had the defendant acquired a right to a statute of limitations defense, i.e., where the preamended limitations period expired before the amended limitations period took effect:

"Because the preamended version of the statute of limitations had not yet expired at the time the amended version extending the period limitations became effective, defendant had not acquired a right to the statute of limitations defense. Had the charge against defendant already been barred under the existing statute at the time the amendment became effective, we would indeed have a different situation before us." *Id.* at 418-419.

*At the time *People v Chesebro* was decided, a CSC I indictment had to be filed within *six years* of the offense.

Similarly, in *People v Russo*, 439 Mich 584, 588 (1992), the Michigan Supreme Court held that the amended limitation period for criminal sexual conduct offenses involving minors under 18* was intended by the Legislature to apply to offenses not time-barred on the effective date of the amended limitations period. The Court did not decide whether the extended limitations period would revive offenses time-barred at the time the amended statute took effect, although it did note that the prosecutor did not make such a contention. *Id.* at 592 n 6. Ultimately, the Court held that retroactive application of the extended limitations period under MCL 767.24 was not a violation of the Ex Post Facto Clauses of the United States and Michigan Constitutions. *Russo*, *supra* at 588.

J. Lesser-Included Offenses and Statute of Limitations Defenses

A trial court may instruct the jury on time-barred lesser-included offenses, but only if the defendant waives the statute of limitations defenses. In *People v Burns*, 250 Mich App 436 (2002), a case of first impression in Michigan, the defendant was charged in 1998 with second-degree murder for killing his 11-month old daughter in 1987. At trial, defendant requested jury instructions on the cognate lesser-included offenses of voluntary and involuntary manslaughter, which were time-barred by the then-existing six-year statute of limitations period under pre-amended MCL 767.24.* The trial court instructed the jury on both lesser-included offenses, but it first made defendant waive his statute of limitations defenses. The Court of Appeals, in upholding the requirement that defendant waive his statute of limitations defenses, based its holding on the following rationale:

“An uncontested statute of limitations defense is distinguishable from other affirmative defenses in that, absent waiver, the defense is conclusive, i.e., a defendant may not be charged with or, therefore, tried on the time-barred offense. Consequently, the issue whether a defendant is innocent or guilty of an uncontroverted time-barred offense is, per se, not submissible to a jury unless the defendant waives the defense. Therefore, MCL 768.32, which permits an accused to be found guilty on a degree of the offense charged in the indictment that is inferior to the charged offense, is not applicable with regard to time-barred offenses. . . . Thus, unless a defendant waives a statute of limitations defense against time-barred offenses, the jury, or judge in a bench trial, may not be permitted to consider whether a defendant should be acquitted or convicted of such offenses.” *Burns*, *supra* at 441-442.

For more information on lesser-included offenses, see Section 2.6.

*At the time *People v Russo* was decided, MCL 767.24 contained a requirement that, for certain limitations periods, the victim must be under 18 at the time of offense. This requirement was eliminated by 2001 PA 6.

*MCL 767.24 was amended by 2001 PA 6, effective May 2, 2001, changing the limitations period of manslaughter from six years to ten years.

4.13 Voluntary Intoxication

*See Section 4.10(C) for more information on involuntary intoxication, which is an affirmative defense solely within the ambit of the insanity defense.

There are two types of intoxication defenses in Michigan: voluntary and involuntary.* Characterizing intoxication as voluntary or involuntary depends upon the facts of each case. *People v Caulley*, 197 Mich App 177, 187 (1992).

Effective September 1, 2002, the Michigan Legislature, through 2002 PA 366, eliminated use of the voluntary intoxication defense, except in narrow circumstances. Under MCL 768.37, the voluntary intoxication defense is an affirmative defense available only to specific intent crimes when the defendant proves by a preponderance of evidence that he or she: (1) voluntarily consumed a legally obtained and properly used medication or other substance; and (2) did not know, and reasonably should not have known, that he or she would become intoxicated or impaired.

Note: Michigan's common-law voluntary intoxication defense, although also applicable only to specific intent crimes, was not an affirmative defense. Instead, it was a defense that inquired as to whether a crime had in fact been committed; unlike an affirmative defense, it did not excuse a crime after its commission. *People v Langworthy*, 416 Mich 630, 637 (1982). Under the common-law defense, a defendant's voluntary intoxication would negate his or her specific intent only when the degree of intoxication was so great that it rendered him or her incapable of entertaining the necessary intent. *People v Savoie*, 419 Mich 118, 134 (1984).

Whether MCL 768.37 supercedes the common-law defense, or its standard, is a matter of legislative intent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183 (1987). However, when the “comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.” *In re Flury Estate*, 249 Mich App 222, 226-227 (2002), quoting *Millross*, *supra*.

A. Statutory Authority

MCL 768.37* provides:

“(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at the time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

“(2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.”

“‘Alcoholic liquor’ means that term as defined in [MCL 436.1105].” MCL 768.37(3)(a).

*Added by 2002 PA 366, effective September 1, 2002.

“‘Consumed’ means to have eaten, drunk, ingested, inhaled, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body.” MCL 768.37(3)(b).

“‘Controlled substance’ means that term as defined in [MCL 333.7104].” MCL 768.37(3)(c).

B. Elements of Defense

The elements of voluntary intoxication are listed in CJI2d 6.2 and paraphrased below:

- 1) You must decide whether the defendant’s mind was so overcome by [alcohol, drugs, or alcohol and drugs] that he or she could not have formed the requisite specific intent. It may help you to think about the following questions:
 - a) How did the defendant look at or near the time of the incident? How did he or she act? What did he or she say?
 - b) How much alcohol or drugs had defendant used?
 - c) Are there any other circumstances surrounding the incident that can help you decide?
- 2) The prosecutor must prove beyond a reasonable doubt that the defendant could and did specifically mean to [*state specific intent of crime charged*], or you must find the defendant not guilty of [*state crime*].

Note: This second element above must be revised in light of MCL 768.37, which shifts the burden of proof to defendant and requires the defendant to prove that he or she voluntarily consumed a legally obtained medication or substance and did not know, or reasonably should not have known, that he or she would become intoxicated.

C. Determining Specific or General Intent

To determine whether an offense requires specific or general intent, a court must look to the Legislative intent and the specific language of the statute. *People v Henry*, 239 Mich App 140, 144 (1999). Specific intent is a particular criminal intent beyond the act done; general intent is the intent simply to do the physical act. *People v Langworthy*, 416 Mich 630, 639 (1982). Words typically found in specific intent statutes are “knowingly,” “willfully,” “purposefully,” and “intentionally.” *People v Davenport*, 230 Mich App 577, 580 (1998). However, the presence of any of these words does not automatically mean that a statute requires specific intent. For instance, when a “knowledge” element is necessary to prevent an innocent act from constituting a crime, the “knowledge” element makes the crime general intent only. In *People v Karst*, 138 Mich App 413, 416 (1984), the Court of Appeals held that an aider and abettor who has “knowledge” of the coparticipants’

criminal intent is guilty of a general intent crime, because the acts undertaken by the aider and abettor without the “knowledge” requirement may be perfectly innocent in themselves. In *People v Watts*, 133 Mich App 80, 83 (1984), the Court of Appeals held that the knowledge element in the crime of receiving and concealing stolen property, which requires a defendant to know that the property was previously stolen, makes the crime a general intent crime because the knowledge element was intended to prevent innocent receipt or possession of stolen property from constituting the commission of the crime.

D. Applicability to Criminal Sexual Conduct Offenses

Voluntary intoxication is *not* applicable to the following general intent criminal sexual conduct crimes:

- F First-degree criminal sexual conduct, MCL 750.520b. *People v Langworthy*, 416 Mich 630, 645 (1982).
- F Second-degree criminal sexual conduct, MCL 750.520c. *People v Bell*, 101 Mich App 779, 782-783 (1980).
- F Third-degree criminal sexual conduct, MCL 750.520d. *People v Davis*, 102 Mich App 403, 407-409 (1980).
- F Fourth-degree criminal sexual conduct, MCL 750.520e. *People v Lasky*, 157 Mich App 265, 272 (1987).

Because the following criminal sexual conduct crimes require specific intent, voluntary intoxication is available as a defense:

- F Assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1).
- F Assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2).